

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CAROLYN L. SHELDON,
MIKE MUSGRAVE,
PETER SELG,
and RODNEY CUMMINGS

Appeal 2008-0488
Application 10/713,811
Technology Center 1700

Decided: December 14, 2007

Before EDWARD C. KIMLIN, BRADLEY R. GARRIS, and
CHARLES F. WARREN, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-2, 4-5, 9-20, 17-20, and 26-27. Appellants do not appeal the Examiner's § 112 rejection of claim 16.

Claim 1 is illustrative:

1. A film woven product formed from a slit film product comprising:
a metallocene catalyzed polypropylene; and
a tenacity of at least about 2.5 g/den, wherein the film product is capable of being drawn at a draw ratio of from about 5.0:1 to about 10.0:1 and wherein the woven product comprises a tenacity of within about 10.0 percent of the tenacity of the slit film.

The Examiner relies upon the following references in the rejection of the appealed claims:

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|-----------|-----------------|---------------|
| Schlecker | 5,393,598 | Feb. 28, 1995 |
| Saito | 6,096,843 | Aug. 1, 2000 |
| Gownder | 2003/0183975 A1 | Oct. 2, 2003 |
| Sheldon | 2004/0013870 A1 | Jan. 22, 2004 |

Appellants' claimed invention is directed to a woven product formed from a slit film product. The film product comprises a metallocene catalyzed polypropylene having the recited tenacity. The woven product is formed by weaving polypropylene film that has been slit into ribbons. According to Appellants, the slit film product unexpectedly retains a higher percentage of tenacity than polypropylene film formed with a Ziegler-Natta catalyst.

Appealed claims 1, 2, 4, 5, 9-14, 17-20, 26, and 27 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Sheldon. Claims 1, 2, 4, 5,

9-20, 26, and 27 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Schlecker in view of either Gownder or Saito.

Appellants do not set forth an argument that is reasonably specific to any particular claim on appeal. Accordingly, the groups of claims separately rejected by the Examiner stand or fall together with claim 1.

We have thoroughly reviewed each of Appellants' arguments for patentability. However, we are in full agreement with the Examiner that the claimed subject matter is unpatentable over the cited prior art. Accordingly, we will sustain the Examiner's rejections for essentially those reasons expressed in the Answer.

We consider first the Examiner's rejection under § 102 over Sheldon. Sheldon, like Appellants, discloses a polypropylene slit film tape that can be used to make a woven product, wherein the tape has a draw ratio within the claimed range, as well as the recited tenacity of at least about 2.5 g/den. Also, Sheldon expressly discloses that the polypropylene may be prepared from Ziegler-Natta or metallocene catalysts. Hence, given this choice of two catalysts, we find that Sheldon fairly describes the claimed metallocene catalyzed polypropylene within the meaning of § 102. Although Sheldon does not specifically disclose the claimed feature that "the woven product comprises a tenacity of within about 10.0% of the tenacity of the slit film," we find no error in the Examiner's reasoning that "because Sheldon et al. teach a woven product formed from a slit film tape comprising isotactic polypropylene having a tenacity of at least about 2.5 g/den, one skilled in the

art would expect the tenacity of their woven product to inherently be within about 10.0% of the tenacity of the film product” (Ans. 4, first para.).

Appellants strongly disagree with the Examiner’s finding of inherency because “[t]he Examiner’s proof of inherency and that one skilled in the art is aware of the property is based on Appellant[s’] own specification” (Principal Br. 4, first para.). However, it is well settled that when a claimed product reasonably appears to be substantially the same as a product disclosed by the prior art, the burden is on the applicant to prove that the prior art product does not necessarily or inherently possess characteristics attributed to the claimed product. *In re Spada*, 911 F.2d 705, 708 (Fed. Cir. 1990); *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977). In the present case, the Examiner has initially presented sufficient evidence that the woven product of Sheldon reasonably appears to comprise a tenacity of within about 10.0% of the tenacity of the slit film, such that the burden has been properly placed upon Appellants to demonstrate with objective evidence that the woven product of Sheldon does not possess the claimed property. Contrary to Appellants’ argument, there is no prohibition against citing an Applicant’s Specification as evidence that there is sufficient correspondence between a claimed product and a prior art product to make an Applicant shoulder the burden of demonstrating that a patentable distinction exists between the two products. Here, Appellants have proffered no such evidence even though Appellants and Sheldon share the same assignee. Also, Gownder, who has the same assignee as Appellants, clearly teaches that metallocene catalyzed polypropylene tapes “provide a greater

percentage elongation at break and a higher tenacity at maximum elongation than do those polypropylene polymer tapes produced using conventional Ziegler-Natta catalysts for the same given draw ratios.” (Para. [0013]). Accordingly, it is our judgment that there is sufficient evidence of record to support the Examiner’s prima facie finding of inherency.

Appellants have not submitted a separate substantive argument against the Examiner’s § 103 rejections, feeling that “repeating such arguments is unnecessary” (Principal Br. 5, penultimate para.). Also, while Appellants reference unexpected results in the Specification, the requisite discussion and analysis of the Specification is not provided in the Brief. Consequently, Appellants have not established that any results found in the Specification would be considered truly unexpected by one of ordinary skill in the art, particularly in light of the Gownder disclosure that metallocene catalyzed polypropylene is superior to Ziegler-Natta catalyzed polypropylene with respect to tenacity.

In conclusion, based on the foregoing and the reasons well stated by the Examiner, the Examiner’s decision rejecting the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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